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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMPUTER SCIENCES CORP., *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In his Memorandum in Opposition to our Petition for a Writ of Certiorari ("Mem. Op."), the Solicitor General has declined to address the merits of our Petition.[1] There is, therefore, no response to our arguments: (i) that the prosecution's legal theory overrides Congress' limitation

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[1] Although the Solicitor General purports not to address the merits, he has characterized the facts concerning the invasions of grand jury secrecy by asserting that Rule 6(d) was violated on only five occasions. Mem. Op. at 3. In fact, there were *at least* five intrusions into the grand jury, as shown by grand jury transcripts disclosed to the petitioners in pretrial discovery. The petitioners have never been given access to the remaining transcripts in order to determine if there were additional intrusions. Before the trial court, the prosecutors asserted that, on the basis of their *ex parte* review of the documents, there was one other possible violation of the Rule. Petition for a Writ of Certiorari at 18, n.9.

on the reach of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, and perverts RICO's statutory policy of preventing the infiltration of legitimate businesses by criminal elements, (ii) that the prosecution improperly escalated corporate employees' submission of false claims into mail and wire fraud charges in contravention of rules of statutory construction announced by this Court in *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978), and in violation of the legislative history of the Mail Fraud law, and lower court precedent (*see United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974)), and (iii) that the Fourth Circuit improperly refused to follow the rule, previously adopted by the Fifth and Eleventh Circuits (*see United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904 (1977)) and most other federal courts (*see, e.g.*, *United States* v. *Lill*, 511 F. Supp. 50, 58 (S.D.W.Va. 1980)), that violations of the grand jury standards prescribed in Rule 6(d) of the Federal Rules of Criminal Procedure are *per se* grounds for dismissal of indictments before trial.[2]

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[2] The Solicitor General has agreed to "file a response on the merits if the Court requests." Mem. Op. at 5, n.2. This form of grudging piecemeal response is, we believe, demeaning to the Court and disruptive of its processes. A respondent should properly present all the reasons supporting his opposition in a single pleading rather than forcing this Court to consider objections to review in a sequential manner. The Solicitor General's reluctance to address the merits may result from inconsistency between the position of the Department of Justice concerning the grand jury claim in this case and the Department's position in *Illinois* v. *Abbott and Associates, Inc.*, No. 81-1114. In that case, the Solicitor General requested this Court to permit States to receive grand jury materials after the completion of

The Solicitor General has offered only one reason why this Court should decline review and that reason is, we submit, demonstrably wrong. Indeed, if it is seriously presented as a legal argument, it provides an additional ground for the granting of certiorari so as to determine its validity for future cases. The Solicitor General contends that "this case is interlocutory," Mem. Op. at 5, n.2, and is, therefore, not "ripe for review by this Court." *Id.*, at 4. This claim—which would foreclose review by this Court of all reversals by federal courts of appeal of pretrial dismissals of criminal indictments—conflicts with the intent of Congress in permitting the government to appeal to the courts of appeal from pretrial dismissals and other pretrial rulings in criminal cases. Neither precedent nor sound judicial policy supports the application of a rule that prevents this Court's review of a court of appeals decision when the government wins but not when it loses.

The Solicitor General relies on two decisions of this Court, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943) and *Heike* v. *United States*, 217 U.S. 423 (1910), to support his contention that our petition is "interlocutory." Both cases, however, involved efforts to

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criminal proceedings. But the Solicitor General took a strong stand against "disclosure *during* a grand jury investigation" to any person, even if disclosure were accompanied by a protective order. Brief for the United States at 26, n.19, *Illinois* v. *Abbott and Associates, Inc.*, No. 81-1114 (emphasis added). The Department of Justice has not displayed a similar concern for the need for grand jury secrecy in this case, in which no purpose is served by permitting unauthorized intrusions into the grand jury. The need for secrecy here is surely greater than in situations where, as in *Illinois* v. *Abbott and Associates, Inc.*, material is sought to be disclosed for legitimate purposes through orderly court procedures.

appeal district court *denials* of defendants' pretrial motions. It is well established that Congress never intended to permit criminal defendants to appeal adverse pretrial rulings by district courts. *See Roche* v. *Evaporated Milk Assn.*, 319 U.S. at 30; *Heike* v. *United States*, 217 U.S. at 428.

By contrast (as this Court noted in *Roche* v. *Evaporated Milk Assn.*, 319 U.S. at 30, n.4), the government since 1907 has been allowed to appeal from the dismissal of an indictment. *See* 18 U.S.C. § 3731; R. Stern & E. Gressman, *Supreme Court Practice* 79-82 (5th ed. 1978). Indeed, until 1971, such issues were considered important enough to warrant direct review in this Court. *See, e.g., United States* v. *Mersky*, 361 U.S. 431, 434-36 (1960).

In 1971, Congress amended 18 U.S.C. § 3731 and provided that a government appeal from the dismissal of an indictment would first go to a court of appeals. That amendment reduced the workload of this Court by decreasing its mandated appellate jurisdiction. But Congress recognized that "cases in the courts of appeals may be reviewed by the Supreme Court . . ." on a petition for a writ of certiorari. H.R. Rep. No. 91-1768, *reprinted in* 1970 U.S. Cong. & Ad. News, 5804, 5849. No one remotely suggested the position now being urged by the Solicitor General—*i.e.*, that if a court of appeals reverses a district judge's dismissal of an indictment, the case must be treated, for purposes of further review, as if the district judge had denied a motion to dismiss. Such a rule would, in effect, oust this Court of jurisdiction to review issues which, prior to 1971, were deemed so important that *only* this Court could review them.

The Solicitor General apparently believes that 18 U.S.C. § 3731 should now be interpreted by this Court to

provide the United States with the right to appeal an adverse district court decision to the court of appeals and then to seek certiorari if its appeal is unsuccessful, but to deny a defendant an equal right to seek certiorari if the government, having lost in the district court, prevails at the appellate level. There is no evidence in the relevant committee reports to support the contention that Congress intended to construct such a one-way appeals process solely for the benefit of the government.

In fact, this Court has granted a petition for certiorari in precisely the same circumstances as are present in this case. In *Serfass* v. *United States*, 420 U.S. 377 (1975), a trial court dismissed an indictment and the government, invoking 18 U.S.C. § 3731, persuaded a court of appeals to reverse. The petitioner requested this Court to grant review and rule that the court of appeals' decision was improper. Althought the Court could have denied the petition for certiorari and awaited a post-conviction appeal—as the Solicitor General now maintains it must do—it granted certiorari and considered the petitioner's claim. *Serfass* thus demonstrates that our petition is in no way "interlocutory."[3] *See also Finch* v. *United States*, 433 U.S. 676 (1977) (*per curiam*).

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[3] In *Serfass*, the petitioner's substantive claim concerned the proper interpretation of the Double Jeopardy Clause. Two years after *Serfass* was decided, this Court distinguished double jeopardy claims from other pretrial grounds for a motion to dismiss. *See Abney* v. *United States*, 431 U.S. 651 (1977). At the time *Serfass* was decided and in the context of that opinion, however, there was no procedural difference in terms of finality between Serfass' claim and the petitioners' claims herein.

Moreover, the Court has granted petitions for certiorari in other analogous situations. 18 U.S.C. § 3731 also permits the government to appeal a pretrial suppression of evidence. In *Gooding* v. *United States*, 416 U.S. 430 (1974), this Court decided a suppression issue that came to the Court in precisely the same posture as this case. A defendant, indicted on charges of possession and concealment of narcotics, moved to suppress evidence seized from his apartment on the ground that the search warrant did not comply with the laws of the District of Columbia. The district court granted the defendant's motion, and the government took an appeal to the District of Columbia Circuit pursuant to 18 U.S.C. § 3731. *See* Brief for the United States at 11, *Gooding* v. *United States*, No. 72-6902. After the court of appeals reversed the suppression order, the defendant petitioned for a writ of certiorari to this Court. This Court granted the petition and decided the case on its merits.

The Solicitor General has also failed to recognize that in situations not governed by 18 U.S.C. § 3731 this Court has heard cases, on petition by criminal defendants, raising claims that proceedings should be terminated before trial. For example, in *Burroughs* v. *United States*, 290 U.S. 534 (1934), a trial court in the District of Columbia dismissed an indictment on the ground that the facts alleged did not state a criminal offense. The Court of Appeals of the District of Columbia reversed, but before the indictment proceeded to trial this Court granted certiorari on the defendant's petition. This Court's readiness to decide the defendant's claims on the merits demonstrated that it is not "premature" or "interlocutory" to consider the validity of an indictment before trial.

Nor is there substance to the Solicitor General's assertion that this case is not otherwise "ripe" for review. The

court of appeals considered and decided the issues presented to this Court, which are questions presented by this record—*i.e.*, whether the conduct alleged in the indictment states an offense under either RICO or the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343) and whether the district court properly remedied several violations of Rule 6(d). Neither claim requires further factual development in order for this Court to review the court of appeals' rulings.

Moreover, petitioners and the district court will be burdened by a lengthy and unnecessary trial if their position is correct and this Court now declines review because of the Solicitor General's "ripeness" assertion. And, as we noted in our Petition (p. 20), the claim based on grand jury intrusion is uniquely appropriate for judicial remedy *before* trial. This Court should, therefore, act promptly to (i) eliminate conflict among the circuits concerning the proper remedy for violations of Rule 6(d), (ii) quell confusion concerning the relationship between the false claims and mail fraud acts, and (iii) halt an avalanche of improper RICO suits, both civil and criminal.

In summary, the sole legal argument made by the Solicitor General in response to our Petition rests on a novel claim of statutory construction which significantly affects this Court's jurisdiction to hear important issues raised at the pretrial stage by criminal defendants. If a district court sustains a claim made at that juncture by a defendant, this Court should not be deprived of jurisdiction to consider that claim simply because the court of appeals disagrees with the district judge. In light of the Solicitor General's stated position, the parties to this case should be instructed to discuss the issue presented by the Solicitor General in their briefs on the merits. Resolution of the issue presented by the Solicitor General will aid both the government and the private bar by erasing any

uncertainty that may exist concerning reviewability in this Court of a court of appeals decision that reverses dismissal of a criminal indictment. The government will know whether—as it asserts—cases at this juncture are not suitable for this Court's review, and prospective petitioners will henceforth know whether their petitions will be treated by the Court as requests to review interlocutory decisions. Accordingly, the writ of certiorari should be granted on all issues raised by the petition and on the novel question now raised by the Solicitor General.

Respectfully submitted,

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